SC86529

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, ex rel. ALMA TELEPHONE COMPANY, et al. and BPS TELEPHONE COMPANY, et al.

Respondents

v.

MISSOURI PUBLIC SERVICE COMMISSION

Appellant.

Appeal from the Cole County Circuit Court
Nineteenth Judicial District
Case No. 02CV324810
The Honorable Thomas J. Brown III

SUBSTITUTE BRIEF OF RESPONDENTS ALMA TELEPHONE COMPANY ET AL. AND BPS TELEPHONE COMPANY ET AL.

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JURISDICTIONAL STATEMENT

This case presents an appeal of a decision by the Missouri Public Service Commission ("Commission" or "PSC") in Consolidated Case Nos. TT-99-428 et al. that has been twice reversed and remanded by the Cole County Circuit Court (19th Judicial Circuit) and the Missouri Court of Appeals – Western District.

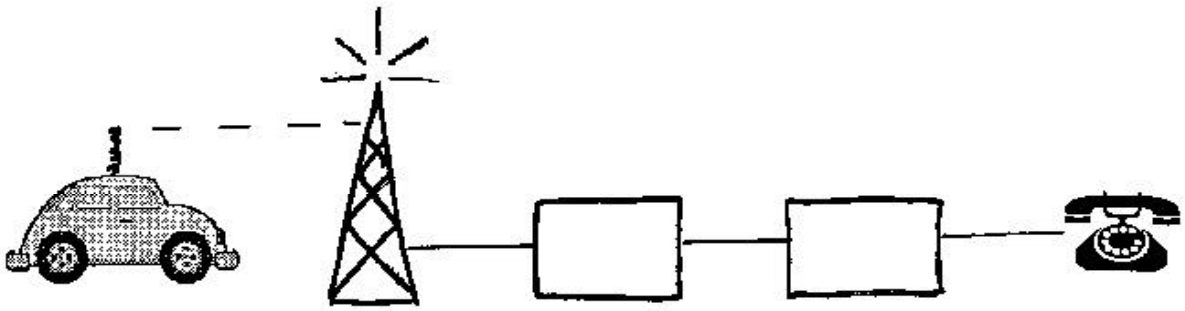
On May 12, 2003, the Circuit Court entered its *Findings of Fact, Conclusions of Law, Judgment, Decision and Order* in its Case No. 02CV324810 reversing and remanding the PSC's decision that Respondents' state tariff rates could not be applied wireless traffic that was delivered in the absence of an approved agreement. L.F. 319.

The PSC and the wireless carriers appealed the Circuit Court's decision, and the Missouri Court of Appeals issued a decision affirming the Circuit Court and reversing the PSC on October 5, 2004. This Court exercised its jurisdiction to review the Opinion of the Court of Appeals in a Transfer Order issued March 1, 2005 pursuant to Rule 83.04. Respondents are placed in the position of appellants for purposes of briefing the case. *See* Rule 84.05(e)

INTRODUCTION

This case involves wireless calls that are delivered to Missouri's small rural telephone companies for completion to rural customers. All of the parties in this case agree that Respondent Small Companies must be compensated for the costs they incur in completing these calls. However, wireless carriers such as AT&T Wireless and Cingular did not pay for their use of the Small Companies' networks in completing wireless calls during the three year period between February, 1998 and February, 2001. The problem arose because the wireless carriers do not directly connect their facilities to those of the Small Companies. Rather, the wireless carriers connect with the facilities of Southwestern Bell Telephone Company d/b/a SBC Missouri ("SBC" or "SWBT"), and SBC connects its facilities to the Small Companies. L.F. 324. *See* Figure 1 below.

Figure 1



Prior to February 5, 1998, SBC compensated the Small Companies pursuant to their respective access tariffs. In a tariff filing, SBC requested to be relieved from this obligation. L.F. 321-22. The Commission granted SBC's request, but, in order to assure that agreements seamlessly replaced the applicability of those access tariffs, the Commission specified that the wireless calls should not be sent to the Small Company until there was an approved agreement between the Small Company and the originating wireless carrier. L.F. 322-23.

The Small Companies were not capable of blocking or otherwise preventing termination of these calls. No agreements between the wireless carriers and the Small Companies were approved, as the Commission had ordered. Because no agreements had been approved, the only billing authority the Small Companies had for this traffic was the same access tariffs under which compensation had previously been paid. Both SBC and the wireless carriers refused to pay bills the Small Companies rendered for wireless calls delivered after February 5, 1998.

The Small Companies filed the tariff language at issue simply to clarify that, until the agreements the PSC ordered actually materialized, the same Small Company access tariffs that applied prior to February 5 1998 would continue to apply until agreements between the wireless carriers and the Small Companies were approved by the PSC.

The question presented by this case is whether it was lawful for the Small Companies' access tariffs to continue to be applied to wireless calls that were delivered to their exchanges in the absence of an interconnection agreement. Respondents believe that this issue has been conclusively resolved by recent decisions by the Missouri Court of Appeals and the Federal Communications Commission ("FCC").

In *State ex rel. Sprint Spectrum v. Public Service Comm'n,* 112 S.W.3d 20 (Mo. App. WD 2003), the Court of Appeals held that state-approved wireless termination service tariffs were not preempted by or in conflict with the Telecommunications Act of 1996 ("the Act"). The *Sprint* decision observed that federal courts have recognized the right of states to enforce tariff provisions which are not inconsistent with the Act, and *Sprint* explained that state tariffs were lawful in the absence of approved agreements:

> The tariffs reasonably fill a void in the law where the wireless companies routinely circumvent payment to the rural carriers by calculated inaction. The tariffs provide a reasonable and lawful means to secure compensation for the rural carriers in the absence of negotiated agreements.[1]

[1] This case arose before the *Sprint* case was decided. The Court of Appeals reversed and remanded the Commission's initial decision for failure to make sufficient findings of fact in *AT&T v. Public Service Comm'n,* 62 S.W.3d 545 (Mo. App. 2001)("*Alma I*"). As a

Sprint, 112 S.W.3d at 26. The *Sprint* case also recognized that the rural carriers have a constitutional right to a fair and reasonable return on their investment. *Id*. The Court of Appeals' *Alma II* decision on appeal in this case is entirely consistent with its prior decision in the *Sprint* case. See Appendix at A-64.

Earlier this year, the Federal Communications Commission ("FCC") also confirmed that state tariffs did not conflict with either the Act or the FCC's rules:

> Because the wireless termination tariffs at issue here apply only in the absence of an agreement, they have not been used to circumvent the processes contained in sections 251 and 252 of the Act. Moreover, the Commission has determined that ***interconnection rates imposed via tariff may be permissible so long as the tariff does not supercede or negate the federal provisions under sections 251 and 252***. For all these reasons, we cannot conclude that a tariff filed by an [ILEC] imposing termination charges on wireless traffic would be unlawful under the existing rules . . .

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result, the *Sprint* decision, which upheld applying state tariffs after February of 2001, was decided first. The instant case involves the application of state access tariffs for calls delivered during the three year period prior to the implementation of state wireless tariffs (between February of 1998 and February of 2001).

T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs, CC Docket No. 01-92, 2005 FCC LEXIS 1212, rel. Feb. 24, 2005 (hereinafter "*T-Mobile*"), ¶13 (emphasis added). See Appendix at A-51.

These state and federal decisions demonstrate that the PSC's *Report and Order* erred as a matter of law, and thus the Circuit Court and the Court of Appeals were correct in reversing the PSC.

STATEMENT OF FACTS

The Parties

Respondents "Alma Telephone Co. et al." are a group of small rural telephone companies comprised of Alma Telephone Company, Chariton Valley Telephone Corporation, Choctaw Telephone Company, Mid-Missouri Telephone Company, MoKan Dial, Inc., and Peace Valley Telephone Company, and Respondents "BPS Telephone Co. et al." are a group of small rural telephone companies comprised of BPS Telephone Company, Citizens Telephone Company of Higginsville, Mo., Inc., Craw-Kan Telephone Cooperative, Inc., Ellington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, Kingdom Telephone Company, KLM Telephone Company,

Lathrop Telephone Company, Le-Ru Telephone Company, McDonald County Telephone Company, Mark Twain Rural Telephone Company, Miller Telephone Company, New London Telephone Company, Orchard Farm Telephone Company, Oregon Farmers Mutual Telephone Company, Ozark Telephone Company, Seneca Telephone Company, Steelville Telephone Exchange, Inc., and Stoutland Telephone Company (referred to herein collectively "Respondents" or "the Small Companies").

Respondents are local telephone companies that provide telecommunications services to small, rural exchanges in Missouri.[2] Specifically, Respondents provide "local exchange telecommunications service," which is defined as "telecommunications service between points within an exchange."[3] For example, local exchange service allows customers of Mid-Missouri Telephone Company of Pilot Grove, Missouri who reside in the Pilot Grove exchange to make "local" calls to other customers in the Pilot Grove exchange.

Respondents also provide "exchange access" services. Exchange access service

[2] Missouri statutes define "small telephone companies" as companies that serve less than one hundred thousand (100,000) access lines. §386.020(30) RSMo. 2000. All Missouri statutory references are to RSMo. 2000 unless otherwise indicated.

[3] §386.020(31) RSMo.

(or simply "access") is defined as "a service provided by a local exchange telecommunications company which enables a telecommunications company or other customer to enter and exit the local exchange telecommunications network in order to originate or terminate interexchange telecommunications service." §386.020(17) RSMo. For example, exchange access service allows customers in Pilot Grove to make calls to telephone users in Jefferson City, Missouri and vice versa.

Respondents provide local and exchange access service within their respective service areas throughout Missouri. L.F. 320-21. Each local exchange company's service area consists of one or more exchanges.[4] A map of Missouri's exchanges and the incumbent local exchange companies ("LECs") providing service to those exchanges is included in the Appendix at A-1.

The Missouri Public Service Commission is an administrative agency that regulates Missouri's public utility companies. §386.250 RSMo. As a part of this duty, the Commission is charged with ensuring just and reasonable rates for

[4] "Exchange" is defined as "a geographical area for the administration of telecommunications services, established and described by the tariff of a telecommunications company providing basic local telecommunications service." §386.020(16) RSMo.

telecommunications services. §392.240 RSMo.

Southwestern Bell Telephone Company d/b/a SBC Missouri provides local exchange telecommunications services and exchange access services within its respective service areas in Missouri. SBC also provides "interexchange" telecommunications services and transports calls between its exchanges as well as the exchanges of other carriers.[5]

Appellants AT&T Wireless Services, Inc. ("AT&T Wireless") and Southwestern Bell Wireless (d/b/a "Cingular") are providers of Commercial Mobile Radio ("CMRS" or "wireless") services. CMRS providers are also referred to herein as "wireless carriers."

Factual Background

During the 1980's and 1990's, SBC delivered wireless traffic to the Small Companies through SBC's wireless interconnection tariff.[6] Through a series of complaint

[5] §386.020(24) defines "Interexchange telecommunications service" as telecommunications service between points in two or more exchanges."

[6] Exhibit No. 1 in Commission Case TT-99-428, at p. 5. (Exhibits will be referred to in "Ex. __, p. __" form).

cases resolved in the 1990's, the Commission held that SBC was responsible for paying the Small Companies their respective access rates on all such wireless traffic.[7]

In 1997, SBC filed a modification to its own wireless interconnection tariff so that SBC would no longer be responsible for the wireless calls it delivered to the Small Companies. Instead, the wireless companies were to make compensation arrangements directly with the Small Companies.[8] L.F. 322. The Commission ultimately approved SBC's tariff modification, and the Commission's decision was upheld by the Cole County Circuit Court. In that case, the Circuit Court specifically quoted the section of

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[7] *In the Matter of United Telephone Company*, Case No. TC-96-112, *Report and Order*, issued April 11, 1997 (*See* Appendix at A-70); *In the Matter of Chariton Valley Telephone Corporation and Mid-Missouri Telephone Company*, Case Nos. TC-98-251 and TC-98-340, *Report and Order* (1999 Mo. P.S.C. LEXIS 25), issued June 10, 1999 (*See* Appendix at A-75).

[8] *In the Matter of Southwestern Bell Telephone Company's Tariff Filing to Revise Its Wireless Carrier Interconnection Service Tariff, P.S.C. Mo.-No. 40*, Case No. TT-97-524, *Report and Order* (1997 Mo.P.S.C. LEXIS 139), issued Dec. 23, 1997 (*See* Appendix at A-80).

SBC's tariff that required the wireless carriers to establish compensation agreements with the Small Companies:

> Wireless carriers shall not send calls to SWBT that terminate in an Other Telecommunications Carrier's network unless the wireless carrier has entered into an agreement to directly compensate that carrier for the termination of such traffic.

L.F. 322. Thus, the Commission and the Circuit Court decisions approving SBC's tariff envisioned that the wireless carriers would enter into agreements with Small Companies prior to sending calls to the Small Companies for completion to their customers.

The wireless carriers did not establish such agreements with the Small Companies, yet the wireless carriers continued to send, and SBC continued to deliver, wireless calls to the Small Company exchanges without any compensation for their use of the Small Company networks. L.F. 324; Ex. 1, p. 7. With no other compensation agreements in place, the only applicable tariffs were the Small Companies' access tariffs. *See* L.F. 331-34; Ex. 1, p. 6. Accordingly, the Small Companies billed SBC and then the wireless carriers under their existing and lawful access tariffs, but SBC and the wireless carriers refused to pay the Small Companies.

1. The Small Company Access Tariffs

In order to address this situation, Respondents Alma et al. filed tariff sheets with the Commission designed to clarify that their existing access tariffs and rates would continue to be applied to the wireless traffic that was being delivered to them until replaced by compensation agreements as had been ordered by the Commission.

Access rates are the rates that a LEC charges another telecommunications company for "access" to the LEC's subscribers in order to originate or terminate an "interexchange"[9] call from outside the LEC's exchange. The purpose of access charges is to compensate each LEC for the use of its local network.[10] The Small Companies have invested significant capital to build, operate, and maintain local networks, and they incur significant costs in operating and maintaining these networks.

2. Missouri's Major Trading Areas ("MTAs")

[9] "Interexchange Telecommunications Service" is defined as "telecommunications service between points in two or more exchanges." §386.020(20) RSMo. An interexchange call is also commonly referred to as a "long distance" or "toll" call.

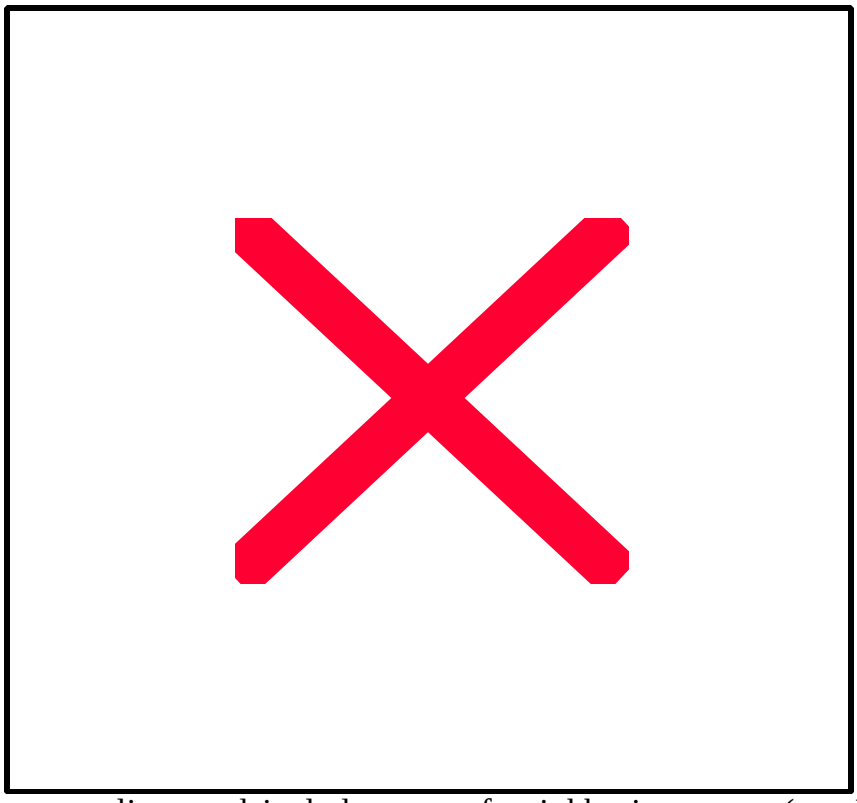
[10] *See generally State ex rel. GTE North, Inc. v. Public Service Comm'n*, 835 S.W.2d 356, 372-3 (Mo. App. W.D. 1992).

Missouri has two "Major Trading Areas"[11] – the Kansas City MTA and the St. Louis MTA. The MTA boundary line roughly divides Missouri into two parts. *See Figure 2 below.* Much of the western half of the state is within the Kansas City MTA, while most of the eastern half of the state is within the St. Louis MTA.[12] These MTA

[11] *See* 47 C.F.R. 24.102. The FCC has determined that the MTA serves as the most appropriate definition of the wireless carriers' local service areas for purposes of reciprocal compensation agreements under the Act. A map that shows Missouri's MTA boundaries superimposed over the ILEC's existing exchange boundaries is included at Appendix A-2 and is also available on the PSC web site at the following Internet address:

http://www.psc.state.mo.us/teleco/maps/MTA_LATA_Exchanges.pdf

[12] Two counties in the northeast and southeast corners of the state are located in different MTAs. Pemiscot county in southeast Missouri is located in the Memphis MTA, and Clark county in northeast Missouri is located in the Des Moines – Quad Cities MTA.



boundaries span state lines and include parts of neighboring states (*e.g.* Kansas City, Kansas and East St. Louis, Illinois).

InterMTA traffic refers to wireless calls that originate in one MTA and terminates in another MTA, such as a call from Pilot Grove, Missouri to St. Louis, Missouri. IntraMTA traffic refers wireless calls that originate and terminate within the same MTA, such as a call from Pilot Grove, Missouri to Kansas City, Missouri.

3. The Disputed Traffic in this Case

Two variables determine the appropriate compensation method for wireless calls to the Small Companies: first, whether an interconnection agreement exists with the small

rural ILEC completing the call; and second, whether the wireless traffic is interMTA or intraMTA in jurisdiction.

The traffic at issue in this case is wireless traffic delivered by SBC in the absence of an approved interconnection agreement between the wireless carrier and the Small Company. There is no question that if the wireless call delivered by SBC is interMTA, then access tariffs apply, whether or not there is an approved interconnection agreement. Prior to the Commission's order approving SBC's tariff modification, the Small Company access tariffs had also been applied to intraMTA traffic. However, after the order approving SBC's tariff modification, SBC and the wireless carriers disputed the lawfulness of applying access tariffs to intraMTA traffic even when there was not an approved interconnection agreement. Respondents' tariff clarification was intended to clarify that access compensation is due pursuant to their current and lawfully-approved access rates unless and until an interconnection agreement between the Small Company and the wireless carrier is approved, as provided in the 1996 Act.

Procedural Background

1. Respondents' Tariffs

In March of 1999, Respondents Alma Telephone Company et al. filed tariff language designed to address this situation. The tariffs stated:

> The provisions of this tariff apply to all traffic regardless of type or origin, transmitted to or from the facilities of the Telephone Company, by any other carrier, directly or indirectly, until and unless superseded by an agreement approved pursuant to the provisions of 47 U.S.C. 252, as may be amended.

L.F. 326. The cases were assigned Case Nos. TT-99-428, TT-99-429, TT-99-430, TT-99-431, TT-99-432, and TT-99-433 ("Case Nos. TT-99-428 et al."). L.F. 326. The Commission's Staff and others filed applications to intervene and motions to suspend these tariffs. On April 8, 1999, the Commission issued its *Order* suspending the tariffs, and an evidentiary hearing was held on October 12-13, 1999. L.F. 326-27.

2. The Commission's January 27, 2000 Report and Order

On January 27, 2000, the Commission issued a *Report and Order* which concluded that the proposed tariff revisions were unlawful and rejected Respondents' proposed tariff revisions. L.F. 327. The Commission's *Order* did not determine the legal issue of the appropriate compensation method to apply to intraMTA traffic delivered before the approval of an interconnection or "reciprocal compensation" agreement.

3. The Cole County Circuit Court's Decision in "Alma I"

In March of 2000, Respondents filed with the Cole County Circuit Court their *Petitions for Writ of Review* pursuant to §386.510 RSMo. ("*Alma I*"). The appeal was docketed as Case No. 00CV323379, and oral argument was held on September 14, 2000.

On November 1, 2000, the Cole County Circuit Court issued its *Findings of Fact, Conclusions of Law, Judgment, Decision and Order*. L.F. 328. The Circuit Court noted that its prior rulings and prior Commission decisions obligated wireless carriers to establish compensation agreements with the small companies prior to sending traffic that terminates in the Small Companies' exchanges. The Circuit Court found that this obligation is "consistent with the Telecommunications Act of 1996, which requires carriers desiring interconnection under a reciprocal compensation arrangement instead of access charges to obtain an approved interconnection agreement." L.F. 332. The Circuit Court concluded that the Act "does not preclude [the Small Companies] from collecting switched access compensation until an interconnection agreement containing reciprocal compensation replaces switched access. L.F. 332. Thus, switched access rates may lawfully be applied prior to the approval of an interconnection agreement. *Id*.

The Circuit Court also held that the Commission's *Report and Order* failed to make sufficient findings of fact and conclusions of law.

4. The Court of Appeals Decision in "Alma I"

The Commission and the wireless carriers appealed the Circuit Court's decision to the Missouri Court of Appeals. After briefing and oral argument, the Western District reversed and remanded the Commission's *Report and Order* for failure to make adequate findings of fact. *AT&T v. Missouri Public Service Comm'n*, 62 S.W.3d 545 (Mo. App. WD 2001).

5. The Commission's Amended Report & Order upon Remand

On remand, the Commission directed the parties to file stipulated facts. C.P. *Alma II* at 89. (Commission Case Papers in the first Circuit Court appeal in 00CV323379 will be referred to as "C.P. *Alma I*". Case Papers in the second Circuit Court appeal in 02CV324810 will be referred to as "C.P. *Alma II*".)

On March 29, 2002, Respondents filed their Proposed Findings of Fact and Motion for Additional Briefing, Supplemental Hearing, and Proposed Conclusions of Law. C.P. *Alma II* at 159. The wireless carriers and the Commission's Staff filed a Stipulation of Facts on the same date. C.P. *Alma II* at 166.

On April 9, 2002, the Commission issued an *Amended Report and Order* which inserted the wireless carriers' proposed findings of fact into the Commission's prior *Report and Order*. C.P. *Alma II* at 175; Appendix at A-34. In this *Amended Order*, like the prior Commission *Order* of January 27, 2000, the Commission concluded that it was

not lawful to apply exchange access tariffs to intraMTA traffic. C.P. *Alma II* at 190. The *Amended Order* did not address the legal question of what compensation would be applied to intraMTA wireless calls delivered before the approval of a reciprocal compensation agreement.

6. "Alma II" before the Circuit Court

On July 19, 2002 , Respondents timely filed their Petition for Writ of Review with the Cole County Circuit Court in the second appeal of this case ("*Alma II*"). L.F. 1. On May 12, 2003, the Cole County Circuit Court issued its *Findings of Fact, Conclusions of Law, Judgment, Decision and Order*. L.F. 319. The Circuit Court concluded that the Commission's *Amended Report and Order* was unlawful. L.F. 330-337. The Circuit Court cited the Western District's *Sprint* case as additional authority, and the Circuit Court reentered the following conclusions of law from its prior decision in *Alma I*:

A. "This Court's prior ruling and the Commission's prior decisions establish an obligation upon wireless carriers and CLECs to establish interconnection agreements containing reciprocal compensation arrangements with [the Small Companies] prior to sending traffic terminating to [the Small Companies]."

B. "This obligation is consistent with the Telecommunications Act of 1996, which requires carriers desiring interconnection under a reciprocal compensation arrangement instead of access charges to obtain an approved interconnection agreement."

C. "The Telecommunications Act of 1996 does not preclude [the Small Companies] from collecting switched access compensation until an interconnection agreement containing reciprocal compensation replaces switched access. Switched access rates may lawfully be applied prior to the approval of an interconnection agreement."

D. "It was unlawful and unreasonable to reject the tariff at issue on the ground that it is unlawful to apply access charges to intraMTA CMRS traffic. The tariff language indicating access would apply until replaced by reciprocal compensation contained in an approved interconnection agreement was not unlawful with respect to intraMTA CMRS traffic."

L.F. 332-34; Appendix at A-15.

7. "Alma II" before the Western District

On October 5, 2004, the Missouri Court of Appeals – Western District issued its opinion finding that the PSC "erroneously determined that the amended switched access tariffs were preempted by federal law." Appendix at A-3; *Alma II*, WD62961, p. 11. The Court of Appeals explained:

> We disagree that federal law is controlling in this situation where the wireless companies have not taken the necessary steps to invoke the reciprocal compensation procedures under the Telecommunications Act of 1996. The rural companies had no alternative but to pursue tariff options under state law because the wireless companies could not be compelled to negotiate compensation rates under the federal Act. To avoid the tariffs, all the wireless carriers have to do is engage in rate negotiations with the rural companies and, thereby, invoke preemptive application of the Act's reciprocal compensation procedures and pricing standards. Until that happens, the wireless companies should not be heard to complain that the access tariffs must be rejected under federal law.

Id. at pp. 10-11. The Court of Appeals concluded, "Given the language of the amendment and the Commission's history of approving access charges on intraMTA

traffic under its state regulatory authority, the rejection of the amended tariffs was neither lawful nor reasonable." *Id.* at 11. Therefore, the Western District reversed the Commission's decision.

POINT RELIED ON

POINT I.

THE MISSOURI PUBLIC SERVICE COMMISSION ERRED IN HOLDING THAT STATE ACCESS TARIFFS COULD NOT APPLY TO WIRELESS CALLS THAT ARE DELIVERED IN THE ABSENCE OF AN APPROVED AGREEMENT BECAUSE THE COMMISSION'S DECISION WAS BASED UPON AN ERRONEOUS INTERPRETATION AND APPLICATION OF LAW SUBJECT TO REVIEW UNDER §386.510 IN THAT THE TELECOMMUNICATIONS ACT OF 1996 ("THE ACT") RETAINED EXISTING COMPENSATION MECHANISMS, INCLUDING ACCESS TARIFFS, UNTIL REPLACED BY RECIPROCAL COMPENSATION ARRANGEMENTS APPROVED PURSUANT TO THE NEW PROCEDURES OF THE 1996 ACT, AND IN THAT NEITHER THE ACT NOR THE FEDERAL COMMUNICATIONS COMMISSION'S RULES PROHIBITED THE USE OF STATE TARIFFS IN THE ABSENCE OF AN APPROVED RECIPROCAL COMPENSATION AGREEMENT.

Authorities

State ex. rel, Sprint Spectrum v. Public Service Comm'n, 112 S.W.3d 20 (Mo. App. W.D. 2003).

T-Mobile et al. Petition for Declaratory Ruling Regarding ILEC Wireless Termination Tariffs, CC Docket No. 01-92, 2005 FCC LEXIS 1212, rel. Feb. 24, 2005.

47 U.S.C. § 251(g)

Smith v. Illinois Bell Telephone Co., 270 U.S. 587; 70 L.Ed. 747, 46 S.Ct. 408 (1926)

STANDARD OF REVIEW

The appellate standard of review for a Commission order is two-pronged: "first, the reviewing court must determine whether the PSC's order is lawful; and second, the court must determine whether the order is reasonable." *State ex rel. AG Processing v. Public Service Comm'n*, 120 S.W.3d 732, 933 (Mo. banc 2003).

When determining whether a Commission order is lawful, courts exercise unrestricted, independent judgment and must correct erroneous interpretations of the law. *State ex rel. Utility Consumer's Council, Inc. v. Public Service Comm'n*, 585 S.W.2d 41, 47 (Mo. banc 1979). The Court need not defer to the Commission, which has no authority to declare or enforce principles of law or equity. *Id.*

If a court determines that an order is lawful, then the next question is whether the order is reasonable. *Utility Consumer's Council*, 585 S.W.2d at 47. An order's reasonableness depends on whether it is supported by competent and substantial evidence upon the whole record, whether the decision was arbitrary, capricious, or unreasonable, or whether the Commission abused its discretion. *State ex rel. Associated Natural Gas Co. v. Public Service Comm'n*, 37 S.W.3d 287, 292 (Mo. App. W.D. 2000).

Because the questions presented in this case are primarily questions of law, the Commission's legal conclusions are entitled to no deference.

ARGUMENT

POINT I.

THE MISSOURI PUBLIC SERVICE COMMISSION ERRED IN HOLDING THAT STATE ACCESS TARIFFS COULD NOT APPLY TO WIRELESS CALLS THAT ARE DELIVERED IN THE ABSENCE OF AN APPROVED AGREEMENT BECAUSE THE COMMISSION'S DECISION WAS BASED UPON AN ERRONEOUS INTERPRETATION AND APPLICATION OF LAW SUBJECT TO REVIEW UNDER §386.510 IN THAT THE TELECOMMUNICATIONS ACT OF 1996 ("THE ACT") RETAINED EXISTING COMPENSATION MECHANISMS, INCLUDING ACCESS TARIFFS, UNTIL REPLACED BY RECIPROCAL COMPENSATION ARRANGEMENTS APPROVED PURSUANT TO THE NEW PROCEDURES OF THE 1996 ACT, AND IN THAT NEITHER THE ACT NOR THE FEDERAL COMMUNICATIONS COMMISSION'S RULES PROHIBITED THE USE OF STATE TARIFFS IN THE ABSENCE OF AN APPROVED RECIPROCAL COMPENSATION AGREEEMENT.

ARGUMENT

The tariff clarification language at issue in this case stated that Respondents' access tariffs would continue to apply until they were superceded by an approved interconnection agreement. In rejecting this language, the Commission did so on the ground it would not be lawful to apply state access tariffs to intraMTA traffic. First and foremost, the Commission's decision contradicts recent decisions by the Court of Appeals in the *Sprint* wireless tariff case[13] and the FCC in the *T-Mobile* case.[14] The Commission's *Amended Report and Order* is also inconsistent with federal law, as well as the Commission's own prior decisions. Finally, the Commission's decision prevents the Small Companies from receiving compensation for a three year period that the wireless carriers were making use of the Small Companies' facilities and services, so it constitutes an unlawful taking of their property in violation of the Missouri and United States Constitutions.

1. State Tariff Rates Could and Did Apply.

In the *Sprint* case, the Court of Appeals examined the question of how the Small Companies can be compensated for delivering wireless calls. The *Sprint* decision

[13] *Sprint*, 112 S.W.3d 20; Appendix at A-64.

[14] *T-Mobile*, CC Docket No. 01-92, 2005 FCC LEXIS 1212; Appendix at A-51.

approved the application of state wireless termination tariffs to intraMTA traffic in the absence of an agreement between the wireless carriers and the Small Companies. The *Sprint* case specifically rejected the wireless carriers' arguments that tariff rates cannot be applied in the absence of a compensation or interconnection agreement:

> To supercede the tariffs, all the wireless companies have to do is initiate negotiations with the rural carriers, and, thereby, invoke the Act's mandatory procedures for reciprocal compensation arrangements and pricing standards. . . . The tariffs reasonably fill a void in the law where the wireless companies routinely circumvent payment to the rural carriers by calculated inaction. The tariffs provide a reasonable and lawful means to secure compensation for the rural carriers in the absence of negotiated agreements.

Sprint, 112 S.W.3d at 26. The *Sprint* court also noted that federal courts have recognized the right of states to enforce tariff provisions which are not inconsistent with the Act. *Id*. at 25. Thus, the *Sprint* case resolved compensation issues on a going-forward basis, and the narrow question that remains in this case is whether the Small Companies' state

access tariffs applied to intraMTA wireless traffic that was delivered in the absence of an approved agreement between February of 1998 and January of 2001.[15]

Because the wireless carriers refused to pay for service, the Small Companies proposed a clarification to their access tariffs to make absolutely clear that the tariffs would continue to apply to wireless calls that were delivered without an agreement. The proposed revision does not change any of the Small Companies' commission-approved access rates,[16] and the Western District's *Sprint* decision recognized that the Small Companies' access rates "had been approved by the Commission in prior proceedings and were, therefore, presumed lawful and reasonable."[17] Thus, the Western District's analysis in the *Sprint* case is equally applicable to the facts presented in this appeal. Indeed, the Western District cited *Sprint* repeatedly in its *Alma II* opinion.

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[15] The wireless tariffs were filed in response to the Commission's decision in *Alma I*.

[16] The Small Companies' approved access rates are presumed lawful and reasonable. §386.270 RSMo 2000; *Sprint*, 112 S.W.3d at 27. This case does not involve any *change* in the rural carriers' existing access rates; it involves only the question whether these existing rates *apply* to intraMTA wireless traffic delivered without an agreement.

[17] *Sprint*, 112 S.W.3d at 24.

In short, the *Sprint* case held that the Small Companies may apply tariffed rates to wireless traffic that is delivered to their exchanges in the absence of an agreement, and the *Sprint* court recognized that the Small Companies' access rates have been approved by the Commission and are presumed lawful and reasonable. The Commission's *Amended Report and Order* contradicts the *Sprint* case, so it should be reversed.

2. The FCC's Wireless Tariff Decision

On February 24, 2005, the FCC issued a decision that denied similar wireless carrier objections to the Small Companies' use of state tariffs in the absence of approved agreements. The FCC explained:

> Because the existing rules do not explicitly preclude tariffed compensation arrangements, **we find that incumbent ILECs were not prohibited from filing state termination tariffs, and CMRS [i.e. wireless] providers were obligated to accept the terms of applicable state tariffs**.

T-Mobile, ¶9 (emphasis added); Appendix at A-51. The FCC continued, "Because the existing compensation rules are silent as to the type of arrangement necessary to trigger payment obligations, we find that it would not have been unlawful for incumbent LECs to assess transport and termination charges based on state tariff." *Id*. at ¶10. The FCC stated, **"By routing traffic to LECs in the absence of a request to establish reciprocal**

or mutual compensation, CMRS [i.e. wireless] providers accept the terms of otherwise applicable state tariffs." *Id*. at ¶12 (emphasis added). Therefore, the FCC concluded that state law tariffs had not been preempted by the Act.

As further support for its decision, the FCC stressed that the Small Companies had no mechanism to compel negotiations with the wireless carriers, and FCC cited the Western District's decision in this case as part of its rationale:

> Although competitors may compel negotiations under section 252, until now incumbent LECs did not have this same ability . . . Thus, absent these wireless termination tariffs, these carriers may have no other means by which to obtain compensation for terminating this traffic, *See Alma Tel. Co. et al. v. Public Service Comm'n of the State of Missouri*, 2004 WL 2216600, at *5 (Mo. Ct. App. Oct. 5, 2004)(finding that a group of rural companies had no alternative but to pursue tariff options because CMRS providers could not be compelled to negotiate compensation rates under the federal Act).

Id. at ¶13, fn 54.

The FCC has held that tariffs remained a viable compensation method in other cases as well. For example, when the FCC examined a compensation dispute between a long distance carrier (AT&T) and a wireless carrier (Sprint PCS), the FCC stated:

> There are three ways in which a carrier seeking to impose charges on another carrier can establish a duty to pay such charges: pursuant to (1) Commission rule; (2) **tariff**; or (3) contract.

In the Matter of the Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges, 17 FCC Rcd 13192; 2002 FCC LEXIS 3262, *Declaratory Ruling*, rel. July 3, 2002, ¶8 (emphasis added); see Appendix at A-91.

Thus, although the PSC's *Amended Report and Order* purports to be based on FCC decisions and rules, recent FCC decisions such as the FCC's 2005 *T-Mobile* decision make clear that the PSC's opinion was in error. In sum, the PSC's decision and its underlying legal reasoning is contrary to decisions by the Cole County Circuit Court, the Missouri Court of Appeals, and the FCC.

3. 47 U.S.C. § 251(g) "safe harbor"

The Commission's decision was unlawful in that the Commission misinterpreted federal law when it erroneously stated that application of state tariffs to intraMTA

wireless traffic violates the 1996 Act. The Act did not automatically replace existing access compensation with reciprocal compensation. Instead, §§251 and 252 of the Act required negotiation and state commission approval of any agreements that were to replace the existing compensation mechanisms in effect. The 1996 Act applies to local traffic delivered pursuant to agreements reached under the terms of the Act, but specifically does not alter the access regime.[18]

The Act provided wireless carriers with a new interconnection and reciprocal compensation option, but the Act left the existing access charge regime in place as a "safe harbor." With respect to the safe harbor, §251(g) of the Act specified continued

[18] *In the Matter of Implementation of Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 1996 FCC LEXIS 4312, CC Docket No. 96-325, *First Report and Order*, ¶1034 (rel. Aug. 8, 1996)(*"Interconnection Order")* ("We find that the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic.")

enforcement of existing compensation structures in existence at the time of enactment of the Act:

> CONTINUED ENFORCEMENT OF EXCHANGE ACCESS AND INTERCONNECTION REQUIREMENTS.—On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information services providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996…

47 U.S.C. § 251(g). The existing access regime is the safe harbor that applies until an agreement is negotiated and approved by the Commission. Thus, state tariffs apply to wireless traffic until the wireless companies pursue the procedures under the Act and establish agreements with the Small Companies. *Sprint*, 112 S.W.3d. at 26.

Federal court decisions also support this conclusion. In *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068, 1072 (8th Cir. 1997), the Eighth Circuit stated that "[t]he Act plainly preserves certain rate regimes already in place." The Eighth Circuit cited §251(g) of the Act and stated, "In other words, the LECs will continue to provide exchange access to IXCs for long-distance service, and continue to receive payment, under the pre-Act regulations and rates." *Id*. at 1073. There is no issue as to what type of compensation applies prior to the agreement. Compensation under the access regime was not disturbed by the Act until a reciprocal compensation arrangement superseded it.

The requirement for wireless carriers to obtain an agreement to directly compensate the Small Companies complies with the Act's process which envisions that access compensation continues to apply under the safe harbor provision of §251(g) until a reciprocal compensation arrangement is negotiated under §251(b). In this case, the wireless traffic was delivered to the Small Companies by SBC in the absence of an agreement. L.F. 324. Thus, the safe harbor provisions remained in force. With no other compensation agreements in place, the only applicable tariffs were the Small Companies' access tariffs.

4. The Commission's Amended Report and Order in "Alma II" is Inconsistent

with Prior and Subsequent Commission Decisions.

During the 1990's, the Commission determined through a series of cases that SBC was responsible to pay the Small Companies' access rates on wireless traffic it terminated to those companies.[19] These decisions include traffic terminated after the effective date of the 1996 Act. Thus, these cases reflect that the safe harbor for the traffic at issue in this case was Respondents' access tariffs.

In 1998, SBC revised its wireless termination tariff to eliminate its obligation to pay the Small Companies. Instead, the wireless carriers were to compensate the Small Companies directly. *Sprint*, 112 S.W.3d at 23. "However, the revisions also prohibited the wireless companies from sending calls through SWBT that terminated with the rural carriers, unless the wireless companies had an agreement to compensate the rural carriers." *Id*. The Cole County Circuit Court upheld the Commission's decision to allow

[19] *See In the Matter of United Telephone Company*, Case No. TC-96-112, *Report and Order*, 6 Mo. P.S.C. 3d 224 (1997), issued April 11, 1997, Appendix at A-70; and *In the Matter of Chariton Valley Telephone Corporation and Mid-Missouri Telephone Company*, Case Nos. TC-98-251 and TC-98-340, *Report and Order* (1999 Mo. P.S.C. LEXIS 25), issued June 10, 1999. Appendix at A-75.

these changes and specifically quoted the section of SBC's tariff that addressed traffic to the Small Companies:

> ***Wireless carriers shall not send calls to SBC that terminate in an Other Telecommunications Carrier's network unless the wireless carrier has entered into an agreement to directly compensate that carrier for the termination of such traffic***.

L. F. 322 (emphasis added). This tariff language prohibiting the wireless calls from being sent in the absence of an agreement demonstrates the Commission's expectation that reciprocal compensation arrangements would be developed, thus superceding the access tariffs. This expectation was consistent with a prior Commission *Order* which held that access rates apply to competitive local exchange carrier (CLEC) traffic delivered in the absence of an agreement:

> ... AT&T and MCI must obtain compensation agreements with the independent LECs. The independent LECs were not a party to this case and should not be affected by the results of this arbitration. ***Until such compensation agreements can be developed, the company's intrastate switched access rates should be used on an interim basis***.[20]

[20]*In the Matter of AT&T Communications of the Southwest, Inc.'s Petition for*

Thus, the PSC's *Amended Report and Order* was inconsistent with its own prior decisions on the applicability of access tariffs.

The PSC's order in this case was also inconsistent with the PSC's subsequent decision in its *Mark Twain* case which held that when there are no agreements with the Small Companies, the Act's reciprocal compensation provisions do not apply.[21] In *Mark Twain* (the decision that gave rise to the *Sprint* opinion), the Commission rejected the wireless carriers' contention that state tariffs could not be applied in the absence of approved interconnection agreements:

> [I]t is apparent from the Act that reciprocal compensation arrangements are a mandatory feature of agreements between the CMRS carriers and the small LECs. However, the record shows that at present there are no such

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Arbitration, Case No. TO-97-40, and *In the Matter of the Petition of MCI Telecom. Corp. for Arbitration and Mediation*, Case No. TO-97-67, *Arbitration Order* ¶28 (Dec. 11, 1996)(emphasis added); Appendix at A-101.

[21] *In the Matter of Mark Twain Rural Telephone Company's Proposed Tariff to Introduce Its Wireless Termination Service*, Case No. TT-2001-139, *Report and Order*, pp. 29-30 (issued February 8, 2001)("*Mark Twain*"); Appendix at A-124.

> agreements between the parties to this case. The Act does not state that reciprocal compensation is a necessary component of the tariffs of LECs or ILECs. Therefore, ***the Commission concludes that Section 251(b)(5) of the Act simply does not apply to the proposed tariffs herein at issue. For the same reason, the Commission concludes that the proposed tariffs are not unlawful under Section 251(b)(5) of the Act***.
>
> The Act obligates the Filing Companies to negotiate interconnection agreements, which must include reciprocal compensation arrangements for local traffic; where agreement cannot be reached through negotiation, the Filing Companies are subject to mandatory arbitration under the Act. Presumably, if there are aspects of these tariffs which the CMRS carriers do not like, they will take advantage of these provisions of the Act.[22]

Thus, the PSC's *Mark Twain* decision held that until another compensation arrangement was reached, the Small Companies were entitled to be compensated for intra-MTA wireless traffic pursuant to their current and lawfully-approved access rates. Otherwise, the Small Companies would have been forced to stand idle and allow wireless carriers to

[22] Appendix at A-124 (*Mark Twain* at 29-30).

use their networks for free. The PSC's *Amended Report and Order* contradicts this *Mark Twain* analysis, making it an anomaly against both prior and subsequent PSC decisions.

5. The Act's Procedures Are Not Automatic.

The PSC's *Amended Report and Order* held that the mere *designation* by the FCC in August of 1996 of the MTA as local for purposes of developing reciprocal compensation arrangements precluded the application of access tariffs. C.P. *Alma II* 186. The Telecommunications Act took effect on February 8, 1996, and the Act gave the FCC six months to develop principles and rules for implementing the Act, including the reciprocal compensation provisions. 47 U.S.C. §251(d)(1). However, the reciprocal compensation provisions under the Act did not take effect automatically.

In August of 1996, the FCC issued its *First Report and Order*.[23] The *Order*, and the FCC rules adopted therein, confirm that the Act created a process for developing reciprocal compensation agreements to replace or supercede access tariffs. The Act requires local exchange carriers to "establish reciprocal compensation arrangements for

[23] *In the Matter of Implementation of Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 1996 FCC LEXIS 4312, CC Docket No. 96-325, First Report and Order, (rel. Aug. 8, 1996) ("*Interconnection Order*")

the transport and termination of telecommunications." 47 U.S.C. §251(b)(5). This requirement is triggered by a request for a reciprocal compensation arrangement or interconnection agreement which must be negotiated.

The FCC's rules promulgated in the *Interconnection Order* indicate that the reciprocal compensation rules are for the purpose of negotiating and/or arbitrating interconnection agreements. The FCC's rules clearly contemplate a subsequent process to be applied in obtaining reciprocal compensation:

> **"Duty to negotiate.**
>
> (a) An incumbent LEC *shall negotiate* in good faith the terms and conditions of agreements to fulfill *the duties established by sections 251 (b) and (c) of the Act*.
>
> (b) A requesting telecommunications carrier *shall negotiate* in good faith the terms and conditions of agreements in paragraph (a) of this section."

47 C.F.R. 51.301 (emphasis added).

* * *

> **"Renegotiation of existing non-reciprocal arrangements.**
>
> (a) Any CMRS provider that operates under an arrangement with an incumbent LEC that was established before August 8, 1996 and that provides for non-

reciprocal compensation for transport and termination of telecommunications traffic is entitled to renegotiate these arrangements with no termination liability or other contract penalties."

47 C.F.R. 51.717

* * *

"Applicability to negotiated agreements.

To the extent provided in section 252(e)(2)(A) of the Act, a state commission *shall have authority to approve an interconnection agreement adopted by negotiation* even if the terms of the agreement do not comply with the requirements of this part."

47 C.F.R. 52.3 (emphasis added). These provisions clearly contemplate that reciprocal compensation would not apply automatically. Rather, after the enactment of the 1996 Act, reciprocal compensation must be requested and negotiated (or arbitrated), then approved by the state commission.

The FCC observed that carriers must follow the procedures in the Act unless there was a rule that became immediately effective. "[T]o the extent that other Commission rules promulgated under the *Local Competition Order* were not made 'effective immediately,' ***we would expect that requesting carriers would utilize the***

interconnection agreement process of sections 251 and 252 to obtain services under section 251." *TSR Wireless v. US West Communications, Inc.*, 15 FCC Rcd 11166, *Memorandum Opinion and Order*, rel. June 21, 2000, ¶28, fn 97 (emphasis added); Appendix at A-142.

Thus, the federal rules reflect the requirement that this process be completed before state tariffs could be superceded. In the *Sprint* decision, the Western District explained, "To supercede the tariffs, all the wireless companies have to do is initiate negotiations with the rural carriers and, thereby, invoke the Act's mandatory procedures for reciprocal compensation arrangements and pricing standards." *Sprint*, 112 S.W.3d at 26. Any such agreements reached through negotiation or arbitration must be approved by the state Commission, and the Commission is obligated to review the agreements reached under § 251 to ensure that they are in the public interest and do not discriminate non-parties.[24]

[24] 47 U.S.C. § 252(e).

6. There Were No Agreements that Displaced Respondents' Access Tariffs.

The Small Companies' proposed tariff revisions violate neither the Act nor the FCC's rules because they do not purport to employ access charges within the context of an interconnection agreement under the Act. Rather, the tariff revisions simply clarified what the law already permitted – that Respondents would apply their access charges only until an agreement is approved:

> The provisions of this tariff apply to all traffic regardless of type or origin, transmitted to or from the facilities of the Telephone Company, by any other carrier, directly or indirectly, *until and unless superseded by an agreement approved pursuant to the provisions of 47 U.S.C. 252*, as may be amended.

L.F. 326 (emphasis added). Therefore, the Commission erred in holding that the Small Company tariffs could not be applied to wireless calls delivered in the absence of an agreement. The Commission's decision was also inconsistent with SBC's tariff, and the Commission's *Order* approving SBC's tariff, which stated the wireless traffic should not be sent to Respondents without an agreement.

Absent an approved agreement, neither the Act nor the FCC's rules prohibited Respondents from applying their Missouri access tariff rates for the termination of intra-MTA wireless traffic. See *Sprint*, Appendix at A-64 and *T-Mobile*, Appendix at A-51.

7. Unconstitutional Takings

Although all of the parties agree that the Small Companies should be compensated for the use of their facilities involved in terminating wireless traffic, the Small Companies were not compensated for intra-MTA wireless traffic delivered during the three year period between February 1998 and February of 2001. The Commission's *Amended Report and Order* continues to impose this unreasonable result to the benefit of the wireless carriers and at the expense of the Small Companies.

Article 1, Section 10 of the Missouri Constitution prohibits the state from confiscating the use of the property of a public utility company by depriving the utility company of reasonable compensation for such use. *McGrew v. Missouri Pacific Ry. Co.*, 230 Mo. 496, 132 S.W. 1076 (Mo. banc 1910). The reasonableness of the rates charged by a public utility "must be determined with due regard to the due process and equal protection clauses of both federal and state constitutions and the statutes of the state in which the public utility operates." *State ex rel. Missouri Water Co. v. Public Service Comm'n*, 308 S.W.2d 704, 714 (Mo. 1958).

Neither the Commission nor the other parties in this case deny that the Small Companies must be compensated for terminating the wireless carriers' calls, yet the wireless carriers paid nothing for three years of calls that were terminated to the Small Companies' exchanges. The Commission's *Amended Report and Order* perpetuates this unlawful and unreasonable situation. As a matter of both law and public policy, the Small Companies must be paid for the use of their facilities and services.

In the *Sprint* case, the Court of Appeals recognized that the wireless carriers had failed to follow prior Commission orders to establish agreements with the Small Companies before sending wireless calls to their exchanges. The *Sprint* decision explained:

> The rural carriers have a constitutional right to a fair and reasonable return upon their investment. The Commission cannot allow the wireless calls to continue to terminate for free because this is potentially confiscatory.

Sprint, 112 S.W.3d at 26 (internal citations omitted).

In the instant case, the Commission recognized that the Small Companies were not being compensated for wireless traffic. The Commission erred in allowing wireless traffic to terminate for free because this is clearly confiscatory. In *Smith et al. v. Illinois Bell*

Telephone Co., 270 U.S. 587; 70 L.Ed. 747, 46 S.Ct. 408 (1926), the United States Supreme Court explained:

> It thus appears that, following the decree of the state court reversing the permanent order in respect of the second schedule and directing further proceedings, the commission, for a period of two years, remained practically dormant; and nothing in the circumstances suggests that it had any intention of going further with the matter. For this apparent neglect on the part of the commission, no reason or excuse has been given; and it is just to say that, without explanation, its conduct evinces an entire lack of that acute appreciation of justice which should characterize a tribunal charged with the delicate and important duty of regulating the rates of a public utility with fairness to its patrons, but with a hand quick to preserve it from confiscation. ***Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them***.

46 S.Ct. at 409-10 (emphasis added). The Commission's failure to ensure that the Small Companies are compensated for the use of their networks is a failure of the Commission's duty to regulate fairly, particularly when the Commission had

unequivocally put the wireless carriers on notice that they were not to send traffic to the Small Companies without first obtaining an agreement to do so.

CONCLUSION

The Commission's opinion that access rates cannot apply in the absence of an approved interconnection agreement is based upon an erroneous interpretation and application of the Telecommunications Act of 1996. The Commission's order is contrary to the FCC's recent decision in *T-Mobile* and the Western District's decision in *Sprint*. The Commission's decision also contradicts the "safe harbor" provisions of the Act and the state and federal prohibitions against unconstitutional takings. Prior to the effective date of an approved interconnection agreement, it was perfectly lawful for the Small Company access tariffs to apply, and by law they did continue to apply.

This Court need not defer to the Commission's erroneous interpretation and application of law. This Court, like the Circuit Court and Western District, should reverse the Commission's *Amended Report and Order* and rule that Respondents' access tariffs applied to wireless calls that were delivered in the absence of an approved agreement between the wireless carriers and Respondents.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document and one copy of the disk required under Rule 84.06(c) were served this 11th day of April, 2005, by either U.S. Mail, postage prepaid, or hand-delivery to the following:

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CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), Respondents hereby certify that this brief complies with the limitations contained in Special Rule No. 1(b) and that, according to the word count feature in Microsoft Word for Windows 97, the entire brief contains 9,095 words and 968 lines. Respondents further certify that, pursuant to Rule 84.06(c), they are filing with this brief a computer disk which contains a copy of the above and foregoing brief, which was prepared using Microsoft Word for Windows 97, and Respondents also certify that the disk has been scanned for viruses and is virus-free.

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